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**In the
Supreme Court of the United States**

OCTOBER TERM, 1976

NO. **76-1034**

JAMES A. MOREAU

Versus

RICHARD A. TONRY, THE FIRST CONGRESSIONAL
DISTRICT DEMOCRATIC EXECUTIVE COMMITTEE and
HONORABLE PAUL J. HARDY, SECRETARY OF STATE
OF LOUISIANA

On Appeal from the Supreme Court of Louisiana

JURISDICTIONAL STATEMENT

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A. The Opinions Below

The Memorandum Decision of the Supreme Court of the State of Louisiana is reported at 339 So. 2d 3, and appears herein as Appendix "A"; the Decision of the Louisiana Court of Appeal, 4th Circuit, is reported at 338 So. 2d 791, and appears herein as Appendix "B"; and the Decision of the 25th Judicial District Court of Louisiana, which is not officially reported, but a transcript of which appears herein as Appendix "C".

B. Statement of the Grounds on which the Jurisdiction
of This Court is Invoked.

1. This proceeding is an election contest growing out of the second primary election held on October 2, 1976, for the nomination of the democratic candidate to run in the general election for the House of Representatives, First Congressional District, State of Louisiana. The suit was brought pursuant

to the provisions of Section 364 of Title 18 of the Louisiana Revised Statutes, copy of which is attached as Appendix "D".

2. The decree which is presented for a review is the opinion and decree of the Supreme Court of Louisiana which was handed down on October 22, 1976, at 11:00 a.m.

Under the provisions of LSA-R.S. 18:364, which controls this proceeding, no petition for rehearing is permitted.

The Notice of Appeal was filed with the 25th Judicial District Court, Parish of St. Bernard, State of Louisiana, the Court of Appeal, Fourth Circuit, State of Louisiana, and the Supreme Court of the State of Louisiana on January 18, 1977.

3. This Court has jurisdiction of this appeal by reason of 28 U.S.C. 1257(2).

4. The cases which sustain jurisdiction are:

Lehner v. O'Rourke, 339 F. Supp. 309.

United States v. Saylor, 322 U.S. 385, 64 S.Ct. 1101.

United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031.

Ex Parte Yarbrough, 110 U.S. 663, 4 S.Ct. 158.

Great Northern Ry. Co. v. Sunburst Oil, 287 U.S. 358, 53 S.Ct. 145.

State of Missouri v. Gehner, 281 U.S. 313, 50 S.Ct. 326.

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451.

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Lacaze v. Johnson, 305 So.2d 140 (1st Cir. Ct. of App.), 310 So.2d 86 (La. S. Ct.).

Garrison v. Connick, 288 So.2d 681 (4th Circ. Ct. of Appl.), 291 So.2d 778 (La. S. Ct.).

5. This appeal calls in question the constitutionality of Section 364 of Title 18 of the Louisiana Revised Statutes; Volume 14, pp. 432-434 of West's Louisiana Statutes Annotated, Appendix "D" hereto.

C. Questions Presented by Appeal

1. Can the challenge to the constitutionality of Section 364 of Title 18 of the Louisiana Revised Statutes (LSA-R.S. 18:364) be raised for the first time in petition for appeal to this Court, when as here the grounds for urging unconstitutionality are supplied for the first time by the new and unexpected interpretation given to the statute in the decision of the court below; and when no application for rehearing is permitted under the express wording of the statute in question.

2. Does LSA-R.S. 18:364, as interpreted in this case by the Louisiana Supreme Court, violate Section 2, Clause 1 of the Constitution of the United States, in that it permits the certification to the Congress of a candidate who has not been chosen by the people of the United States?

3. Does LSA-R.S. 18:364, as interpreted in this case by the Louisiana Supreme Court, violate Section 4, of Clause 1 of the Constitution of the United States in that it legislates regarding the electoral process in such a way as to infringe upon basic constitutional protection in the electoral pro-

cess?

4. Does LSA-R.S. 18:364, as interpreted in this case by the Louisiana Supreme Court, violate the Fourteenth Amendment to the Constitution in that it abridges the privileges and immunities secured to citizens of the United States, and deprives the petitioner of his right to run for office without due process of law?

Statement of the Case

The petitioner Moreau and the defendant Tonry opposed each other in the second primary election held in the First Congressional District, State of Louisiana, to select the democratic nominee to run in the general election for the office of U.S. Congressman from that district to be held on November 2, 1976

The final official returns show Tonry defeating Moreau by a total vote of 48,789 to 48,605 or a margin of 184 votes.

Pursuant to the provisions of LSA-R.S. 18:364(H) which requires that the suit be filed within two days after the official promulgation of the results of the election, Moreau filed this suit within the hour of the release of the election results by the Secretary of State, on the afternoon of Thursday, October 7. He charged specifically and in detail that 762 fraudulent votes were cast in 15 precincts in St. Bernard Parish for Tonry and that Moreau as a result should be declared the winner of the election; or alternatively, that the election should be annuled in order to be rerun. The details of Moreau's suit will be discussed at more length below.

The suit was assigned for trial on the morning of Tuesday, October 12, 1976, on the fifth day of its filing, pursuant to

the express and mandatory provisions of LSA-R.S. 18:364 (B).

The matter was tried all during the day of Tuesday, October 12. Wednesday, October 13 was devoted to defense maneuverings as a result of which a trial judge from outside the district was appointed by the Louisiana Supreme Court to hear the case; was resumed on Thursday and went to a decision on Friday night, in favor of the defendant Tonry, dismissing the plaintiff's suit.

The plaintiff then and there moved to appeal. The appeal was lodged with the Court of Appeal, Fourth Circuit, on Tuesday, October 19 and argued on the morning of Wednesday, October 20, to the court sitting en banc. The Court of Appeal handed down a unanimous decree of all nine judges at 11:00 a.m. on October 21, 1976, reversing the district court and annulling the election.

The defendant Tonry that afternoon applied to the Supreme Court of Louisiana for writs of certiorari and review, which the court granted at approximately 5:00 p.m., ordering oral argument before the court at 9:00 p.m. that same night.

The court took the case under advisement that night at approximately midnight and, the next day, Friday, October 22, 1976, at 11:00 a.m., the court handed down its opinion and decree annulling the decree of the Court of Appeal and reinstating the judgment of the district court dismissing plaintiff's suit. Justice Summers and Chief Justice Sanders dissented with written reasons.

No petition for rehearing is permitted under the Election Contest Law. See LSA-R.S. 18:364(G).

Monday, October 25, 1976, was a legal holiday. On Tuesday, October 26, Moreau, joined by four individual electors, filed a civil rights class action in the United States District Court for the Eastern District of Louisiana.

The tortured progress of that case will already be familiar to the Court as the result of the efforts of the plaintiffs there to obtain a hearing before the general election of November 2, 1976; and, after the election (in which Tonry defeated the Republican, as well as the independent candidates) to obtain a hearing before Tonry would have taken his seat in Congress, all to no avail. The Court is referred to Petitions for Stays and other remedial relief addressed to Mr. Justice Powell in the matters entitled, "James A. Moreau, et al v. Richard A. Tonry, et al," bearing Docket No. , and of the Supreme Court of the United States, in which this Court denied relief.

That suit is now pending before the United States Court of Appeals for the Fifth Circuit on an interlocutory, expedited appeal, in which all proceedings in the United States District Court have been stayed pending the appeal. The matter is to be heard there on January 26, 1977.

Can the Challenge to the Constitutionality of Section 364 of Title 18 of the Louisiana Revised Statutes (LSA-R.S. 18:364) be raised for the first time in petition for appeal to this Court?

This brings us to the first question presented by this appeal. It will be seen that in giving the statement of the case, no mention is made of the stage in the proceeding at which the constitutional issues were raised. This is so because the constitutional issues were not presented and could not be anticipated until the Supreme Court of Louisiana handed down its decree on October 22, 1976. The law of Louisiana

does not permit a petition for rehearing in election contests, and so the petitioner has had no opportunity to raise the unconstitutional aspects of the law as it now stands in light of the interpretation given the Louisiana Election Contest Law by the Supreme Court in *this* case.

The Interpretation of LSA-R.S. 18:364 Prior to the Instant Decision

Preliminarily, the Court will have to be given the theory of plaintiff's case, as it was brought, and as it was prosecuted through the state courts to the ultimate decision from which we appeal.

Then the case will be examined against the Louisiana Election Contest Law (LSA-R.S. 18:364), as it had been interpreted time and again by the Louisiana Supreme Court, *prior* to the Court's interpretation in this proceeding. With this before it, the Court will see that the interpretation given to the state law was not only unprecedented, but was a departure from all preceding interpretations of the statute in question, and was therefore an interpretation which petitioner could not have anticipated at any time during the proceeding so as to raise the constitutional issue which the Supreme Court's bizarre interpretation presented in this case.

First then, we turn to Moreau's suit. His suit was succinctly stated by the Court of Appeal, Fourth Circuit, as follows:

"According to Moreau, in 15 voting precincts in St. Bernard Parish, 616 more votes were cast on the machines than the total number of persons listed on the precinct registers as having voted; and, the names of persons who did not appear at the polling places to vote were entered on poll lists,

and votes in a corresponding number were voted on machines in those precincts.

"Moreau claims that in the suspect precincts, and particularly three of those precincts,² the names of persons who had not appeared at the precinct to vote were placed on the poll lists, were voted on the machines, and no signatures were entered on the precinct registers; further, that persons' names were entered on the poll lists and a corresponding number of votes were cast on the machines when, in fact, the persons named on the poll lists were not registered in that precinct; also, that persons' names were entered twice on the poll lists and votes were cast in corresponding numbers. He claims that 146 forgeries were made in the precinct registers, and a corresponding number of votes were cast on the machines. These forgeries, Moreau contends, are in addition to the 616 fraudulent votes cast. He claims, further, that the names of three deceased persons were forged and votes cast for those deceased persons. According to Moreau, when these fraudulent votes are eliminated, he, as recipient of the majority of the legal votes cast, is entitled to be declared the Democratic nominee. Alternatively, he contends that if the proven frauds and irregularities are of such a 'serious nature' as to deprive the voters of the free expression of their will, the election should be set aside and a new election ordered."

The Court of Appeal went on to an examination of the

²"2 - Ward 3, Precinct 6, St. Bernard Parish; Ward 4, Precinct 1, St. Bernard Parish; and, Ward 4, Precinct 2, St. Bernard Parish."

voting records and paraphernalia, and concluded that the records in three precincts disclosed 315 instances of illegal votes where there were votes cast for registered voters who did not appear at the polling place and sign their registration card and vote; or where votes were cast in the name of a person who was not registered to vote in the precinct, or where a vote was cast in the name of the same person more than once. The Court also identified in Ward 3, Precinct 6, 42 forgeries of which three were forgeries of names of deceased persons; and one forgery in another precinct bringing the total to 43, or a grand total of 368 illegal and fraudulent votes which had gone into the total returns.

The Court found, however, that the record did not establish with sufficient certainty that these votes were cast for Tonry; and so the Court denied Moreau's principal claim to relief, that he be declared the winner.

Citing *Dowling v. Orleans Parish Democratic Committee*, 235 La. 62, 102 So. 2d 755,¹ and *Lewis v. Democratic Executive Committee of Eunice*, 232 La. 732, 95 So. 2d 292, the

1. Parenthetically here we are going to quote from Dowling the court's explanation in detail of the procedure to be followed by the voter and the poll commissioners from the time the voter enters the polling booth until he casts his vote. We feel that this is essential to an understanding of the issues presented by this appeal:

"The law governing the procedure for voting (R.S. 18:256, one of many sections of the Revised Statutes added by the provisions of Act 415 of 1952) is specific with reference to the conditions to be met before a person may vote, all requirements being mandatory; the voter gives his name and address to a commissioner; these are repeated then in a loud and distinct tone of voice, and repeated again on the outside by a watcher designated by the commissioners; if the name is found in the precinct register by the commissioner, he again repeats it; the voter affixes his signature in the space provided on the certificate of registration --former (Footnote 1 - continued on next page)

Court of Appeal went on to a consideration of Moreau's alternative plea, that, if the election results contained fraudulent votes in such numbers as to make it doubtful that the results as promulgated, represented the will of the majority of the electorate, then the election should be declared null and void.

Noting that the numbers of illegal votes far exceeded the 184 vote margin of victory claimed by Tonry, the court concluded that the election results were inaccurate and not a reliable expression of the will of the electorate and nullified the election.

The decision was squarely in line with the jurisprudence of the Louisiana courts in their interpretation of LSA-R.S.

(Footnote 1 - continued from previous page)

signatures and his registration signature thereon being effectively concealed from him until he has signed; the commissioners then compare signatures, in the presence and view of bystanders, and if satisfied of the voter's identity and qualification, 'a commissioner shall sign his name in the space reserved for the commissioner's certification opposite the name written by the voter and shall put the date of election in the proper space. * * * The voter shall then, but not until then, be allowed to vote, and his name shall be entered on the poll list by the commissioners.' With the above system prevailing and carried out, it was clearly an impossibility for any person to enter the voting machine and vote without the knowledge and consent of the commissioners present and unless permitted to do so, because their participation and active assistance was necessary to (a) check the precinct register, (b) write the name of the voter in the poll list, and (c) clear the voting machine for the next vote. There is, moreover, the legal presumption that all votes recorded on the voting machine have been so recorded only with the knowledge of the commissioners, since the commissioners are presumed to do their duty."

Dowling v. Orleans Parish Executive Committee, supra, p. 755.

18:364, on the facts known to the plaintiff, and found by the Court of Appeal;² the plaintiff had every reason from the time he filed his suit to expect this application of the law to the facts of his case, on his alternative demand, should he fail in his principal demand. He had no reason to anticipate that an appellate tribunal would tolerate the certification of election returns, unpurged of 368 identified, fraudulent votes, when the margin between the candidates was 184 votes. No case in the jurisprudence has ever suggested such an intolerable and unconstitutional interpretation of the law.

We turn to an analysis of the cases in the Louisiana jurisprudence. *Dowling v. Orleans Parish Democratic Committee*, 235 La. 62, 102 So.2d 755, is a leading case on the subject, and the one cited as the principal authority by the Court of Appeal.

In that case Dowling had lost to O'Hara in the race for District Attorney of Orleans Parish by a 9 vote margin. The case was decided by a divided court, 4 to 3. The majority found that at least 17 votes were illegally cast and that they could have only been cast by or with the connivance of the commissioners. The majority, charging the votes to O'Hara, because all of the commissioners in the challenged precinct were supporters of the O'Hara faction, ruled Dowling the winner.

The significance of the case, so far as the issue here is concerned, lies in the unanimous agreement of all members of the court, that the very least that should have been done was to nullify the election. The three dissenting judges in separate dissents took the view that under no circumstances could the election be allowed to stand. Thus we find Justice McCaleb citing *Lewis v. Democratic Executive Committee*,

2. The Courts of Appeal of Louisiana have jurisdiction to pass on the facts as well as the law.

supra, dissenting and saying:

"Thus, in this case, where the tabulation of the voting machines from the Third Precinct of the Second Ward reveals a total of 17 votes more than the number of persons' signatures contained on the precinct register, it is fair to deduce that there were 17 illegal votes cast in the precinct . . . Accordingly in instances where the proven illegal votes may well affect the accuracy of the proclaimed result, it becomes the obligation of the Court to set aside the election and order another one. This is what I believe should be done in this case."

Justice Hawthorne, dissenting and citing Lewis:

"The facts of this case disclose that at the primary election over 91,000 votes were cast. By the final tabulation of the votes O'Hara received a majority of only nine votes, and was accordingly declared the nominee. It is proven beyond any question, however, that in the Third Precinct of the Second Ward 17 illegal votes were cast, a greater number than the total of O'Hara's majority. Accordingly, these 17 votes must be disregarded and not included in the final tabulation of all votes cast for both candidates. That the total of these votes should be deducted from the total of all votes cast is clear, but the perplexing question is: From which candidate's total votes should they be deducted."

After discussing his conclusion that the circumstantial proof that the votes were cast for O'Hara was not sufficient to justify deducting them from O'Hara's total the court

went on to say:

"For this reason I think this court should order the second primary election annulled and set aside and another primary election held so that the will of the majority of the people can be determined. See *Lewis v. Democratic Executive Committee*, 232 La. 732, 95 So.2d 292."

Justice Hamiter, dissenting:

"I am satisfied that fraud, sufficient to nullify the result of the election as promulgated by the Democratic Committee, was perpetrated in the casting of the contested seventeen votes in Precinct 3 of Ward 2. To me it is inconceivable that these votes could have been cast without the knowledge and assistance of at least three of the attending commissioners (this number is required at all times for the proper operation of the polling place).

"But merely because the commissioners wore badges bearing the name of Mr. O'Hara, and they were considered to be members of his political faction, it does not necessarily follow that such candidate received the illegal votes. The persons guilty of the wrongful manipulation of the voting machines, thereby depriving the voters of the free expression of their will, also would not have hesitated to commit - and might well have performed - a Judas Iscariot act: They, for suitable remuneration, turning against the person whom they apparently favored in the first instance.

"Therefore, I am of the opinion that, rather than

declaring Mr. Dowling to be the democratic nominee, there should be judgment ordering the calling and holding of another second primary election."

We do not believe that the Dowling case can be compared to the Louisiana Supreme Court's majority ruling in the instant case, and with the dissents in the instant case and with the unanimous holding and the four opinions of the Judges of the Court of Appeal, without concluding to a mortal certainty that the Louisiana Supreme Court was guilty of a radical departure from the consistent interpretation of LSA-R.S. 18:364 by prior courts.

All of this is *not* for the purpose of convincing Your Honors that the Louisiana Supreme Court committed error in the interpretation of a Louisiana statute. That is a matter beyond the concern of this Court. The point is that the established jurisprudence of Louisiana would have purged the election of the identified, illegal votes by deducting them from the total of the candidate receiving them, where the recipient could be determined, or by annulling the election, if the recipient could not be determined, but the identified illegal votes were in an amount which exceeded the winner's margin.

This interpretation is a *constitutional* interpretation. And so Moreau could not have known to protect himself against any other, and possibly unconstitutional interpretation, at any stage of the proceeding prior to the Louisiana Supreme Court's decision on October 22, 1976.

If any more need be said on this point we cite *Lacaze v.*

Johnson, 310 So.2d 86 (La. 1974),³ which was cited by Judge Schott in his concurring opinion in the Court of Appeal, and by Justice Summers of the Supreme Court in his dissent. Judge Schott pointed out that Lacaze involved an election of 122,000 votes, resulting in a difference between the candidates of 44 votes, and the election was nullified because the machine failed to register 144 votes. There was, of course, no way to know for whom those votes, unrecorded, were cast. Still the majority court in the instant case says:

"No case has been called to our attention (and we know of none) where an election has been upset because of serious and pervasive irregularities when the evidence falls short of proving that '*but for*' the irregularities the one contesting the election would have won." (Emphasis added). *Moreau v. Tonry*, 339 So.2d 3, 4.

In other words, Moreau lost because he could not prove that the fraudulent votes, which riddled the election process in St. Bernard Parish, went to Tonry. It is this treatment given to LSA-R.S. 18:364 which renders it unconstitutional.

3.. This case has a confusing citation. It involved a malfunctioning voting machine which failed to register 144 votes in a Congressional general election in which some 122,000 votes were cast for the two candidates. The contestee led by a margin of 44 votes. The district court enjoined the tabulation and promulgation of the returns. The Court of Appeal, on writs, reversed. 305 So.2d 140. (Nov. 13, 1974). The Supreme Court on writs reversed the Court of Appeal, 302 So.2d (Nov. 14, 1974) reinstated the injunction and remanded the case for trial. After trial the district court nullified the election and ordered the holding of a new general election. The Supreme Court refused writs, holding that, in malfunctioning, the machine failed to record votes in sufficient number as to *possibly* alter the election outcome.

The appellant Moreau is entitled to the treatment announced in *Saunders v. Shaw*, 244 U.S. 317, 37 S.Ct. 638, *Ward and Gow v. Krinsky*, 259 U.S. 503, 42 St. Ct. 529, *State of Missouri v. Gehner*, 281 U.S. 313, 50 S.Ct. 326, *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, *Great Northern Ry. Co. v. Sunburst Oil*, 287 U.S. 358, 53 S.Ct. 145; to the effect that even though the constitutional issues were not raised by appropriate challenges in the pleadings prior to the decision by the state court of last resort, they are yet available to the litigant whose constitutional rights are impinged by the construction given to a state statute, for the first time, by the decision of the state court of last resort.

We recognize that in each of those cases the charge of unconstitutionality was raised in the appellant's petition for rehearing in the state court. That was not done here. But the reason it was not done is that the statute which is itself under attack, expressly denies to this litigant the right to present any issue for reconsideration by a petition for rehearing. The fact is that this petition for appeal is the first and only opportunity to raise this serious and pervasive constitutional issue.

Then we submit that the first question posed by this appeal should be answered in the affirmative and that the appeal should be considered, notwithstanding the fact that the plea of unconstitutionality has not been presented to the state court for decision.

Does LSA-R.S. 18:364, as Interpreted in this Case by the Louisiana Supreme Court, Violate Section 2, Clause 1 of the Constitution of the United States, in that the Certification to the Congress of a Candidate who has not been Chosen by the People of the United States?

We find no case which passes on the point raised here. Our contention is that Section 364 of Title 18 of the Louisiana Revised Statutes, as it has been interpreted and applied here, permitted the defendant Tonry to be certified as the democratic nominee to run in the general election for the office of Member of the House of Representatives in the United States Congress from the First Congressional District.

In this sense the question reaches far beyond the validity of the statute as it affects elections concerned with state or local offices. Concededly the state has the right under Section 4, Article 1 of the Constitution to pass laws providing for the administration of congressional elections, and may under this grant of authority pass such legislation as it deems appropriate to guard against error and fraud in the conduct of those elections. But those laws must be enacted, and, once enacted, must be applied by the state courts, so as to guarantee that the underlying democratic principle expressed in Section 2, Clause 1 of Article 1 of the Constitution will be achieved. That is that the member of the House of Representatives who is sent to Congress as a result of the state's administration of its election law, in congressional elections, will be a member "chosen... by the People of the several States."

If the Louisiana Election Contest Law allows certification of a candidate to be the winner in an election where it is conceded by the state court of last resort that illegal votes had been identified in the election totaling at least 358 votes, when the winner's margin was only 184 votes, then that law does not satisfy the constitutional mandate. The law is unconstitutional. The results in this case speak for themselves. Tonry went on to win the general election. He now sits in Congress.⁴

4. It has long since been judicially noticed that in Louisiana, the nominations in the party primaries are an integral part of

Other events, all public knowledge, fortify this conclusion. All of the commissioners in Ward 3, Precinct 6 have been indicted by a United States Grand Jury with vote fraud in this election. The indictment charges the commissioners with casting 87 fraudulent votes for Tonry.

In Ward 4, Precinct 1, all five commissioners were indicted for vote fraud, charging 108 fraudulent votes to have been cast for Tonry.

In Ward 4, Precinct 2, four of the five commissioners have been indicted with casting 163 fraudulent votes for Tonry. The fifth commissioner is cooperating with the office of the U. S. Attorney.

The Louisiana Election Contest Law is unconstitutional. The federal law will not tolerate this system of certification.

Does LSA-R.S. 18:364, as Interpreted in this Case by the Louisiana Supreme Court, Violate Section 4, of Clause 1 of the Constitution of the United States in that it Legislates Regarding the Electoral Process in Such a Way as to Infringe upon Basic Constitutional Protections in the Electoral Process?

Section 364 of Title 18 does not permit the individual elector to litigate in protection of his right to vote and have his vote counted. It is significant that the only permissible lit

(Footnote 4 - continued from previous page)

the congressional election process and come within the purview of the constitutional protection. *U.S. v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 1037. The court there expressly so held. And in the First Congressional District, as was judicially noticed there for the Second Congressional District, the democratic nomination is tantamount to election.

igant is a "candidate." See *Reid v. Brunot*, 96 So. 43, 153 La. 490.

Nonetheless, the right to vote is a civil right guaranteed under 28 U.S.C.A. 1343 and 42 U.S.C.A. 1983 as well as the Constitution. This includes the right to have the vote meaningfully counted. *U.S. v. Classic*, supra. All of these claims of the voters have necessarily been brought to the federal bar in the class action proceeding in the federal court. It is being strenuously opposed there on the ground that the decision of the state Supreme Court has foreclosed further pursuit of their rights in the federal jurisdiction. We as strenuously oppose this contention.

We mention it to Your Honors so that you may take it into account in determining whether the right to vote has been here impugned. If the Fifth Circuit Court of Appeals should agree with our opponents, then the proceeding here must, of necessity, involve the right to vote, and must certainly infringe it.

Moreau, pursuant to Section 5 of Article 1 of the Constitution has challenged Tonry's right to his seat in the House of Representatives by appropriate and timely memorial filed with that body. There we are strenuously opposed, that he has no standing to sue. If that position is maintained, again, this appeal will be the only chance to vindicate his claim, or that of the electors.

The right of the electors, if it is at issue here, was brushed aside by the Supreme Court, by their interpretation of the Louisiana law, allowing the election returns, including the fraudulent votes to stand.

Does LSA-R.S. 18:364, as Interpreted in this Case by the Louisiana Supreme Court, Violate the Fourteenth Amendment to the Constitution in that it Abridges the Privileges and Immunities Secured to Citizens of the United States, and Deprives the Petitioner of his Right to Run for Office without Due Process of Law?

As a practical matter, the decision here that the contestant must prove that "but for" the fraudulent votes he would have been the winner, denies to him any hope of relief.

Of course, the commissioners could confess their guilt. And they could say to whom they gave the fraudulent vote. But they would never do this. And no judge would be willing to believe them if they did.

He is thus denied any meaningful remedy and is deprived of his right to the office without due process of law as it is guaranteed to him by the provisions of the Fourteenth Amendment to the Constitution of the United States.

The opinions and decrees of the courts below are attached as Appendices "A" through "C". The Notices of Appeal are attached as Appendix "D".

For the foregoing reasons it is submitted that it is in the interests of justice for the appellant to be granted leave to docket the appeal, so that the appeal can be considered on its merits by this Court.

Respectfully Submitted,

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Buras, Louisiana

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By: _____
Gilbert V. Andry, III

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Jurisdiction Statement has been served upon all opposing counsel by hand.

New Orleans, Louisiana, this 19th day of January, 1977.

Gibson Tucker, Jr.

APPENDIX "A"

MAJORITY OPINION OF THE SUPREME COURT OF
LOUISIANA AND DISSENTS OF SUMMERS, JUSTICE,
AND SANDERS, CHIEF JUSTICE

SUPREME COURT OF LOUISIANA
NO. 58791

JAMES A. MOREAU
VERSUS
RICHARD A. TONRY, et al.

On Writ of Certiorari, or Review, to the Court of Appeal,
Fourth Circuit, Parish of St. Bernard, Louisiana

DIXON, Justice

In this election contest the Court of Appeal reversed the district court and annulled the election, vacating the certification of defendant Tonry, the Democratic nominee for Congress, leaving the nominee to be named by the appropriate Democratic Committee.

The factual findings to support the action of the Court of Appeal are: forty-three forged signatures on the precinct register and three hundred fifteen more votes cast on the voting machines than signatures on the precinct registers (out of a total of almost one hundred thousand votes). (The trial court had discounted the effect of such "irregularities" because among other reasons, it found only minimal differences between the number of voters on the poll lists and the number of votes cast on the machines). The Court of Appeal found that "no inference can be made that these illegal votes were cast for Tonry."

Nothing has been proved to us to compel a different conclusion.

"The statutory rule in Louisiana is that an election may be upset only if the one contesting the election can show that "but for irregularities or fraud he would have been nominated. . ." (R.S. 18-364 (B)).

The plaintiff Moreau argues that if the number of "irregularities" exceed the difference between the candidates, the outcome of the election cannot be determined. This has never been the law. If the candidate cannot prove he would have been elected "but for irregularities or fraud," our jurisprudence refers to an alternative: if the court finds the proven frauds and irregularities are of such a serious nature that the voters have been deprived of the free expression of their will, the election will be nullified.

" . . . For this Court to render such a drastic order, there must be a clear showing that a course of fraudulent conduct was employed which effectually prevented the electors from expressing their will." *Lewis v. Democratic Executive Committee*, 232 La. 732, 95 So.2d 292 (1957).

No case has been called to our attention (and we know of none) where an election has been upset because of serious and pervasive irregularities when the evidence falls short of proving that "but for" the irregularities, the one contesting the election would have won.

The solution adopted by the Court of Appeal is innovative, and not necessarily productive of fair elections. The candidates are removed from the reach of the lawful election

machinery, even though neither has been found responsible for fraud and irregularity, and neither can be held the winner "but for" the irregular votes. As stated in *Landry v. Ozenne*, 194 La. 853, 195 So. 14 (1940):

" . . . If this were permitted it is easy to see that in every case in which a candidate was defeated by a small margin of the votes, two elections would inevitably be held – one at the polls and the other in the courts. . . ." 195 So. 14, 23.

Law is derived from human experience over a long enough time to give validity to that experience. Fraud and illegality in elections are not to be condoned. However, we find it significant that in the long history of election contests in this State, although recognizing that there might be an election which should be upset for widespread fraud which cannot be proved to supply the winning margin, this court has consistently disallowed an election contest where the claims are similar to those of this plaintiff. See *Lewis v. Democratic Executive Committee*, supra.

The irregularities found by the Court of Appeal are not so pervasive that the election must be nullified.

Therefore, the judgment of the Court of Appeal is reversed, and the judgment of the district court, dismissing plaintiff's suit, is reinstated; the stay order previously issued in this case is hereby annulled and recalled.

Sanders, C.J., dissents and will assign written reasons.

Summers, J., dissents and will assign reasons.

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SUPREME COURT OF LOUISIANA

NO. 58791

JAMES A. MOREAU

VS.

RICHARD A. TONRY, ET AL.,

SUMMERS, Justice (dissenting).

I subscribe to the opinion of the Court of Appeal, So. 2d . On the facts found by that court this judgment nullifying the election is correct. Without setting forth why this Court holds that the irregularities found by the Court of Appeal are not so pervasive that the election must be nullified. The carefully drawn unanimous opinion of the Court of Appeal refutes this conclusion in a nine-judge review. As Justice Dixon said on another occasion these facts demonstrate

"This Court can and should annul elections when the irregularity or irregularities permeates the entire election, *or when there is an irregularity which makes it impossible to determine which candidate the people lawfully elected.*" (emphasis added). *LaCaze v. Johnson*, 310 So. 2d 86 (La. 1974)

Under the facts of this case, that principle is abrogated. This Court's opinion leaves open a situation in which widespread practices of fraud and irregularities provide no remedy unless the candidate can show that the practice deprives him of the election. Such a ruling under the facts of this case disregards the elaborate statutory procedure for contesting elections and decrees that no remedy is available in a

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most objectionable situation where the will of the people is in fact frustrated.

I respectfully dissent.

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SUPREME COURT OF LOUISIANA

NO. 58,791

Oct 25, 1976

JAMES A. MOREAU

V.

RICHARD A. TONRY, ET AL

SANDERS, Chief Justice (dissenting). J.W.S.

Election frauds and irregularities are difficult to prove because of their clandestine nature and the limited time available to assemble evidence. Despite the difficulty of legal proof, however, the reviewing judges in both lower courts found frauds and irregularities in the present case.

The applicable rule, reiterated by this Court in several decisions, is as follows:

"[I]f the court finds the proven frauds and irregularities are of such a serious nature as to deprive the voters of the free expression of their will, it will decree the nullity of the election..."
See *Garrison v. Connick*, La., 291 So.2d 778 (1974); *Dowling v. Orleans Parish Democratic Committee*, 235 La. 62, 102 So.2d 755 (1958); *Lewis v. Democratic Executive Committee*, 232 La. 732, 95 So. 2d 292 (1957).

I subscribe to the opinion of the Court of Appeal that the present case falls within the rule. See, La. App. So. 2d, (1976). As found by the Court of Appeal, the frauds and irregularities included forgery, multiple voting, voting in the name of deceased persons, and the voting of persons without

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supporting precinct registers.

These frauds and irregularities were both systematic and flagrant. They infected far more votes than the vote margin between the two competing candidates. This means that the voters have been deprived of the free expression of their will, because the outcome of the election cannot be determined.

As the Court of Appeal aptly stated:

"These fraudulent practices cannot be condoned under any circumstances and must be ferreted out if we are to insure that the free and honest expression of the will of the electorate is reflected in the democratic process."

For the reasons assigned, I respectfully dissent.

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APPENDIX "B"

MAJORITY AND CONCURRING OPINIONS OF THE
JUDGES OF THE COURT OF APPEAL, FOURTH
CIRCUIT STATE OF LOUISIANA

JAMES A. MOREAU
V.
RICHARD A. TONRY, THE FIRST
CONGRESSIONAL DISTRICT
DEMOCRATIC EXECUTIVE COMMITTEE
AND HONORABLE PAUL J. HARDY,
SECRETARY OF STATE OF LOUISIANA

NO. 8222
COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

* * *

APPEAL FROM THE TWENTY-FIFTH JUDICIAL DIS-
TRICT COURT IN AND FOR THE PARISH OF ST.
BERNARD, STATE OF LOUISIANA DIVISION "A",
NO. 28-837, HON. MELVIN A. SHORTESS, JUDGE

* * *

JAMES C. GULOTTA, JUDGE

(Court composed of Judges L. Julian Samuel, William V. Redmann, Harry T. Lemmon, James C. Gulotta, Edward J. Stoulig, John C. Boutall, Patrick M. Schott, Ernest N. Morial and Peter H. Beer.)

REDMANN, J., CONCURS WITH WRITTEN REASONS

BOUTALL, J., CONCURS WITH WRITTEN REASONS

SCHOTT, J., CONCURS WITH ADDITIONAL REASONS

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MORIAL, J., SPECIALLY CONCURS FOR THE REASONS
ASSIGNED BY REDMANN, J.

LUKE A. PETROVICH
SIDNEY W. PROVENSAL, JR.
GIBSON TUCKER, JR.
JERALD N. ANDRY & GILBERT V. ANDRY, III
For Plaintiff-Appellant

MARTZELL AND MONTERO
JOHN R. MARTZELL
THOMAS M. McBRIDE, III
For Defendant-Appellee-Cross Appellant,
Richard A. Tonry

Oct 21, 1976

ANNULLED AND SET ASIDE:

In this Congressional second primary election contest, James Moreau claims 1) that elimination of the fraudulent and illegal votes cast for his opponent, Richard Tonry, would result in Moreau's receiving a majority of the legal votes cast, thereby entitling him to be certified as the Democratic nominee; or, alternatively, 2) that fraud and illegality were so widespread and systematic that the results of the election are unreliable and a new election should be ordered.

It is Moreau's contention that fraudulent votes, well in excess of Tonry's 184-vote majority tabulated by the Clerks of Court,¹ were cast in voting precincts controlled by Tonry commissioners and supporters and that the result of the election would be changed if those fraudulent votes were elimin-

1. See LSA-R.S. 18:1193(B).

According to Moreau, in 15 voting precincts in St. Bernard Parish, 616 more votes were cast on the machines than the total number of persons listed on the precinct registers as having voted; and, the names of persons who did not appear at the polling places to vote were entered on poll lists, and votes in a corresponding number were voted on machines in those precincts.

Moreau claims that in the suspect precincts, and particularly three of those precincts,² the names of persons who had not appeared at the precinct to vote were placed on the poll lists, were voted on the machines, and no signatures were entered on the precinct register, further, that persons' names were entered on the poll lists and a corresponding number of votes were cast on the machines when, in fact, the persons named on the poll lists were not registered in that precinct; also, that persons' names were entered twice on the poll lists and votes were cast in corresponding numbers. He claims that 146 forgeries were made in the precinct registers, and a corresponding number of votes were cast on the machines. These forgeries, Moreau contends, are in addition to the 616 fraudulent votes cast. He claims, further that the names of three deceased persons were forged and votes cast for those deceased persons. According to Moreau, when these fraudulent votes are eliminated, he, as recipient of the majority of the legal votes cast, is entitled to be declared the Democratic nominee. Alternatively, he contends that if the proven frauds and irregularities are of such a "serious nature" as to deprive the voters of the free expression of their will, the election should be set aside and a new election ordered.

In dismissing Moreau's suit, the trial judge concluded that 74 illegal or fraudulent votes had been cast in favor of Tonry;

2. Ward 3, Precinct 6, St. Barnard Parish; Ward 4, Precinct 1, St. Bernard Parish; and, Ward 4, Precinct 2, St. Bernard Parish.

and, after eliminating and deducting those votes from Tonry's total, he declared Tonry the Democratic nominee. In oral reasons for judgment, the trial judge concluded that 51 forgeries were proved from the testimony of Gilbert J. Fortier, Jr., a handwriting expert. He further concluded that in Ward 3, Precinct 6 of St. Bernard Parish, all five commissioners were Tonry supporters who had invoked the Fifth Amendment of the United States Constitution and refused to testify concerning the practices in that precinct during the election conducted on October 2, 1976. Based on a showing that 23 votes were cast on the voting machines in excess of the number of signatures in that precinct register, the judge isolated those excess votes and purged them from the Tonry total in that precinct. Any additional claims of irregularity, illegality or fraudulent voting were rejected by the trial judge. He further rejected Moreau's alternative plea to set aside the election.

While we are in agreement with the conclusion reached by the trial judge that a number of illegal votes were cast, the record discloses a different total of votes which can be identified. Our consideration of the testimony leads us to conclude that in one precinct (Ward 3, Precinct 6) 41 forged votes were cast according to the handwriting expert. Of those 41, three were forgeries of deceased persons who were voted in St. Bernard Parish.³ In addition, one voter who appeared at the polls testified that a Tonry commissioner entered the voting machine with him, and the commissioner cast a vote for Tonry when the voter did not desire to do so. Further, in another precinct, one witness testified that he cast a vote and signed the register on behalf of his wife who did not appear at the precinct. These forged and thus illegal

3. The deceased persons are 1) Frances L. Henritz, 2) Leonard W. Miller, died November 1, 1974, and 3) Irene B. Strauch, died August 10, 1976.

votes total 43.

We reject Moreau's contention that because of irregularities in the 15 suspect precincts where a greater amount of votes were cast on the voting machines and names were placed on the poll lists in excess of the signatures on the precinct registers, those votes totalling 616 should be eliminated and deducted from the Tonry vote. It is clear that a tabulation of Michael M. Chauppette, the internal auditor for Plaquemines Parish, showed 616 more votes cast on the voting machines than signatures on the precinct registers in the 15 suspect precincts.⁴ According to Chauppette, examination of the names appearing on the poll lists in the particular precincts were checked against the precinct registers in those precincts, and where no corresponding signature appeared on the precinct register or no registration card was contained for that person in the precinct register, those names were totalled. Also, where a person's name was listed twice on the poll list, these instances were noted.

Tonry contends that the authenticity of the discrepancies as they apparently appear on the tally sheets can be proved only by a comparison of the signatures on the poll lists with the precinct registers in each precinct, and that it is plaintiff's burden to correlate the claimed fraudulent entries on the poll lists with the precinct registers showing that no corresponding signatures were entered on the precinct registers or that persons were not registered, notwithstanding that the precinct registers are available for inspection by the court. He further contends that it is not the court's responsibility to ferret out this connecting evidence and to supply the proof to establish authenticity of plaintiff's claim. We reject this

4. Those precincts are as follows: Ward 1, Precinct 1, Precinct 3, Precinct 4; Ward 2, Precinct 1, Precinct 2, Precinct 5, Precinct 6; Ward 3, Precinct 1, Precinct 2, Precinct 3, Precinct 4, Precinct 6; Ward 4, Precinct 1, Precinct 2, Precinct 3.

argument.

In *Dowling v. Orleans Parish Democratic Committee and O'Hara*, 235 La. 62, 102 So. 2d 755 (1958), the court stated that a contestant (seeking to be declared the nominee) must show that but for fraud and irregularity, he would have received a majority of the legal votes cast; or a contestant (seeking to set aside an election) must show that the illegalities and fraud were "of such a serious nature as to deprive the voters of the free expression of their will" requiring a nullity of the election. See also *Lewis v. Democratic Executive Committee of Eunice*, 232 La. 732, 95 So.2d 292 (1957).

It is clear that in certain precincts in St. Bernard Parish illegal votes were cast. These fraudulent practices cannot be condoned under any circumstances and must be ferreted out if we are to insure that the free and honest expression of the will of the electorate is reflected in the democratic process.

In three precincts alone, 315 more votes were cast on the machines than signatures entered on the precinct registers. However, these illegal votes cannot be identified and purged from the total vote received by Tonry since sufficient proof did not establish that all of the commissioners in those precincts were Tonry supporters or Tonry commissioners. Under the circumstances, no inference can be made that these illegal votes were cast for Tonry. See *Dowling*, supra. We cannot deduct the illegal votes from the Tonry total. We reject, therefore, Moreau's claim that he is entitled to be declared the Democratic nominee.

We are quick to point out that no claim is made nor is it indicated that Tonry was a party to, participated in or condoned any of the proven illegal acts. It is not our intention

to imply that our finding of illegal votes being cast reflects adversely on the character or reputation of either one of the two candidates.

Having so concluded, we now turn to a consideration of Moreau's alternative plea that a new election should be called because of allegations of widespread and systematic fraud. The Louisiana Supreme Court, in *Lewis, supra*, indicated that where fraud or illegality existed to such an extent as to deprive the voters of the free expression of their will, the election will be set aside. The court stated:

"* * * [If] the alleged fraud and irregularities were so gross as to make it evident that the electors did not have an opportunity to freely express their will, plaintiff would state a cause of action for annulment of the entire election even though he might not be able to prove that he would have been nominated but for such frauds and irregularities.* * *"

The primary thrust of contestant's alternative claim centers primarily around four precincts in Wards 3 and 4 of St. Bernard Parish. As hereinbefore pointed out, the record clearly establishes in Ward 3, Precinct 6, that 42 fraudulent votes were cast. The Chauppette audit graphically points out that in Ward 4, Precinct 1, 114 more votes were cast on the voting machines and were entered in the poll lists than signatures on the precinct register. In that precinct, the machines registered (including absentee votes) a total vote of 1,163. Approximately 10% of the votes registered in that precinct were cast without signatures appearing on the precinct register. Likewise, in Ward 4, Precinct 2, 178 more votes were cast on the voting machines and were entered in the poll lists than signatures on the precinct register. In that precinct, the machines registered a total vote of 1,002. Ap-

proximately 18% of the votes registered in that precinct were cast without signatures appearing on the precinct register.

The discrepancies revealed by Chauppette's audit include numbers of votes cast in excess of signatures on the precinct registers and votes cast in the names of persons for whom there were no registration cards in the precinct register, and, in some instances, duplicate names on the poll lists for which corresponding votes were cast.

While we are aware of (and take judicial notice of) the fact that voting machine totals and registration book totals are not always equal, common sense compels the conclusion that the discrepancies in the instant case cannot be categorized as coincidental or as "honest error". We conclude that it is not reasonable for such discrepancies to exist-- particularly in light of the proven instances of fraud, illegality and irregularity hereinabove discussed in some detail.

Although these illegal votes cannot be attributable to one candidate or the other, nevertheless, the extent of the discrepancies in the three suspect precincts totalling 315 votes, when considered in light of the proven incidents of fraud and forgery, cannot be included in the vote total. The number of illegal votes exceeds the 184-vote majority of Tonry.

This conclusion is further augmented by applying the same reasoning to the evidence adduced in behalf of Tonry by his able counsel to the effect that the same type of discrepancies existed in the 28 precincts of Ward 8 of Orleans Parish, where 559 votes were cast and the number of votes exceeded the number of signatories to the precinct register by 116 -- a percentage of approximately 20%.

Illegallities such as occurred in Ward 3, Precinct 6 and in

Ward 4, Precincts 1 and 2, where votes were cast in the names of persons who in some cases were not even registered, or whose names were not signed to the precinct register, or where duplications on poll lists occurred, are of such serious nature that these practices will not be condoned or tolerated under any circumstances. We, therefore, conclude that the practices hereinabove described were just as effective in preventing the voters from expressing their will as if they had been restrained from such expression, in view of our finding that the total of the votes cast is inaccurate since it includes a sufficient number of illegal votes as to render the final outcome doubtful.

As the Supreme Court stated in Dowling and Lewis, where the illegalities in an election are of such a "serious nature" as to deprive the voters of the free expression of their will, the election will be set aside and nullified. The illegal practices were of such serious nature in the instant case.

Accordingly, the judgment of the trial court is annulled and set aside. It is further ordered and decreed that the Democratic 2nd Primary Election for Representative in Congress for the 1st Congressional District held on October 2, 1976, is annulled, and the certification of the Democratic nominee resulting therefrom is vacated and set aside.

ANNULLED AND SET ASIDE

NO, 8222

JAMES A. MOREAU

VS.

RICHARD A. TONRY, ET AL.,

REDMANN, J., CONCURRING

Few candidates indeed could muster the forces that mastered the foulness of this election. A simple tallying of signatures on precinct register cards to compare with votes on voting machines is, however, within the reach of a reasonably knowledgeable candidate. I would therefore prefer to annul this apparent 184-vote victory because of the admitted 616 votes for which there are no voters' signatures in the precinct registers. In future election contests, candidates (and their commissioners) should know that a vote on the machine without a voter's signature in the precinct register (or other lawful support) will not be allowed to decide an election. (See dissent, 288 So. 2d 686, 688-689, in *Garrison v. Connick*, La. App. 4 Cir. 1974, 288 So.2d 681, *reversed*, 291 So. 2d 778.)

JAMES A. MOREAU

NO. 8222

VS.

COURT OF APPEAL

RICHARD A. TONRY, THE FIRST
CONGRESSIONAL DISTRICT DEMO- FOURTH CIRCUIT
CRATIC EXECUTIVE COMMITTEE
AND HONORABLE PAUL J. STATE OF LOUISIANA
HARDY, SECRETARY OF STATE
OF LOUISIANA

APPEAL FROM THE TWENTY-FIFTH JUDICIAL DIS-
TRICT COURT FOR THE PARISH OF ST. BERNARD,
NO. 28-837, HON. MELVIN SHORTESS, JUDGE.

(COURT EN BANC) Consisting of Judges L. Julian Samuel,
William V. Redmann, Harry T. Lemmon, James C. Gulotta,
Edward J. Stoulig, John C. Boutall, Patrick M. Schott, Ernest
N. Morial, Peter H. Beer.

BOUTALL, J. CONCURRING.

I concur with the result of the majority opinion herein and I am in substantial agreement with the thoughts expressed therein. However, as I have stated in my dissent in the case of *Garrison v. Connick*, 288 So. 2d 681 at page 686, I cannot agree that mere failure of a voter to sign the precinct register is sufficient ground of itself to consider the nullity of an election, to which I add that such a vote should not be imputed against the victor as an additional penalty to an irregular vote, but the circumstances of this case are such as to require a conclusion that the large numbers of unsigned registration cards, when considered with the other evidence presented, is persuasive to a conclusion that the result of this election was based upon the types of irregularities denounced

by the statute. L.R.S. 18:364 (B). Of the fifteen precincts complained of in the petition, some four were used in argument as particular target precincts, and in those precincts, the largest amount of irregularities occurred. My own examination of the evidence in those four precincts convinces me that there were at least 259 irregular and fraudulent votes cast therein. I particularly rely upon the forged signatures of voters and the large amount of voters for whom no registration card appears. Accordingly I ascribe to the majority opinion.

However, having reached the conclusion that the result of the election should be annulled, I find, and I suppose that the majority of this court has some difficulty, that because of the time frame involved in this particular election process, there is insufficient time to order that a new primary election be held for the nomination of the Democratic Candidate. Under the provisions of L.R.S. 18:362, L.R.S. 18:1072, and the holdings of the cases of *Downs v. Pharis*, 240 La. 580, 124 So. 2d 553, and *Plessala v. Landry*, 244 So.2d 298, there is ample authority for this court to have declared that the issue before it was moot, because no effective remedy can be offered at this late date by way of a judicial declaration ordering a new election. The result therefore was that the statutory provisions provided for the name of one of the candidates to be declared the nominee and placed upon the ballot in time for the general election. The order of the Louisiana Supreme Court dated October 13, 1976 in this case delayed absentee voting in this election until further orders of that court. As I see it, this order has the effect of removing this case from the limitations imposed by the *Downs* case (this being a Supreme Court decision we are bound by its holding) and the statutory law. If the intention of that court was to remove the question of mootness in this case, then it appears to me that the Supreme Court should announce that

Downs is overruled and make a clear delineation as to what the statutory procedure to be followed is in a case such as this, where the very holding of the general election is now cast in doubt by the inability of the prospective absentee voters to cast their ballots. Whether or not the former procedure was fair to a particular candidate, it at least was certain as to this being placed upon the ballot timely for the general election. Perhaps a legislative remedy is needed in such circumstances but the stay order has caused uncertainty at least in my mind. In any event, I presume that the provisions of L.R.S. 18:362 still apply to this case.

JAMES A. MOREAU

V.

NO. 8222

RICHARD A. TONRY, THE FIRST
CONGRESSIONAL DISTRICT DEMOCRATIC
EXECUTIVE COMMITTEE and HONORABLE
PAUL J. HARDY, SECRETARY OF STATE
OF LOUISIANA

SCHOTT, J., CONCURRING WITH ADDITIONAL
REASONS:

In *LaCaze v. Johnson*, 310 So.2d 86 (La. 1974), the Supreme Court refused a writ where the trial court had nullified an election in which there was a difference of 44 votes between the two candidates out of a total of approximately 122,000 votes cast because of the malfunction of a single voting machine which failed to register 144 votes.

The instant case is analogous in that there was a difference between the two candidates of 184 votes and a breakdown of the human election apparatus in Ward 4, Precinct 2 of St. Bernard Parish, which resulted in 178 votes being cast for one candidate or the other over and above the number of signatures placed on the precinct register and in Ward 3, Precinct 3, where there were 41 forged signatures on the register and 23 votes cast in excess of signatures placed.

Ordinarily a minor discrepancy between the number of votes cast and the number of signatures would not provide a basis for nullifying an election because it is virtually impossible to eliminate human error from the election procedure. For that reason the figure of 616 developed by plaintiff as the overall difference among 15 precincts is not per-

suasive, especially when one considers how little the overage was in certain precincts. For instance, in Ward 1, Precinct 3, there were only 14 votes in excess of the 693 signatures, and in Ward 1, Precinct 4, only 10 in excess of the 734 signatures. However, the problem in Ward 4, Precinct 2, is quite different. There the 178 excessive votes constituted almost 20% of the total votes cast. It is inconceivable that a group of election commissioners could have permitted so many illegal votes to be cast by mistake. If nothing more, this constitutes a gross malfunction on the part of the commissioners, no less disruptive to the election than the malfunction of the machine in the *LaCaze* case.

The record indicates that the discrepancy in Ward 4, Precinct 2, is not merely the result of neglect but rather is the result of fraud. There are a number of names on the poll list which do not appear to identify with any of the registered voters in the precinct, and there are three signatures which are repeated indicating that these individuals were allowed to vote twice. When the commissioners were called as witnesses in the trial court four out of five refused to testify, invoking the protection of the Fifth Amendment of the Constitution of the United States, protecting one against self-incrimination. The fifth commissioner originally refused to testify on the same ground and then recanted, but his testimony is not worthy of belief on the critical point. He stated that the reason for the 178 excessive votes was the crowd which presented themselves for voting during half time and at the conclusion of a football game. Even if believable this explanation is not an excuse for such gross malfeasance in the performance of his duties.

As to the other four, their invocation of the Fifth Amendment as an excuse for refusing to testify in this civil case compels me to infer that wrong doing was committed by them. This is not to say that such wrong doing should be attributed to either candidate, but the circumstances demon-

strate that it was not merely neglect which caused the illegal votes to be cast but fraud on the part of these commissioners.

The trial judge deducted from Tonry's total the 23 excessive votes found in Ward 3, Precinct 6, along with votes connected with 51 forged signatures, on the apparent basis that since the election commissioners in that precinct were called by Moreau their invocation of the Fifth Amendment afforded a basis for the conclusion that fraud was committed by the commissioners in Tonry's behalf. I can not agree with this conclusion. I agree that there is an inference of fraud on the part of the commissioners who refused to testify but there is no evidence to show in whose behalf the fraud was committed. I would not deduct these votes from Tonry's total.

On the other hand, it is clear that gross fraud was committed in Ward 3, Precinct 6, in the form of the 41 forged signatures being placed on the precinct register. In addition, these commissioners permitted three individuals to vote twice and one to vote three times, and three votes were cast in the names of deceased persons. There were 23 more votes put through the machine than signatures collected. While this discrepancy of 23 votes standing alone might ordinarily be explained by innocent human error, but under the circumstances of gross fraud prevailing in this precinct I would eliminate these 23 votes. When the 41 forgeries and the 23 illegal votes from Ward 3, Precinct 6, are added to the 178 illegal votes from Ward 4, Precinct 2, there is a sufficient number of votes missing from the total count so that either of the candidates could have been the winner.

I have joined in the majority opinion and decree and concur in the result declaring the election null and void.

APPENDIX "C"

ORAL REASONS FOR JUDGMENT DICTATED INTO THE
RECORD BY THE HONORABLE MELVIN SHORTESS,
DISTRICT JUDGE, AD HOC, OCTOBER 15, 1976

25TH JUDICIAL DISTRICT COURT FOR THE PARISH
OF ST. BERNARD
STATE OF LOUISIANA

NO. 28-837

JAMES A. MOREAU

Versus

RICHARD A. TONRY, ET AL.

THE COURT:

Gentlemen, I am ready to hand down my decision. Before I do so, I would like the audience to please comply with the following rules: Please don't anyone leave until after I finish with my decision and please don't anybody come out with any emotional outbursts or anything else until after the Court has been adjourned and our business is concluded.

If you all would cooperate with me on those two respects, I think we will be out of here shortly and I know everybody is tired and would like to get this thing over with.

This is an election contest suit. James A. Moreau has filed suit against Richard A. Tonry under the provisions of R.S. Title 18 relative to contesting results of primary elections.

Tonry has been certified by the Secretary of State as the nominee of the Democratic Party for the office of Member of the U.S. House of Representatives for the First Congressional

District.

The figures as per P-33 and his additional proclamation indicate that Tonry received 48,798 votes and that Moreau received 48,446 votes.

The difference is 362 votes in Tonry's favor.

Moreau's original complaint together with his three supplemental and amending petitions set forth specific allegations of voter fraud and irregularities as required by law.

He seeks, as the Court appreciates, two remedies: First he asks the Court to subtract all illegal or fraudulent votes contending that by doing so, since according to his figures, approximately 616 votes are involved, that he will become the winner; alternatively, he seeks to have the primary election annulled.

Innitially, the Court will put to rest the alternative demand for a new election. This is not a Lacaze-type case on the facts.

In Lacaze the Court was unable to determine the results because of a voting machine malfunction and the election was so close that no one could determine who the real winner was without the votes from that machine and know what fraud was involved in the contest.

The Court must then apply the legal principles it feels applicable and decide on who the winner is.

It is an unpleasant task because the Court is convinced that both Mr. Moreau and Mr. Tonry are very honorable men and that the Democrats of the First District would be well represented by either man, but in politics we must have a winner.

Both sides cite Dowling versus The Orleans Parish Democratic Committee in support of their respective positions, and the Court agrees Dowling does set forth the proper legal test to be applied here.

The gut language from Dowling which has been cited repeatedly in other cases and which the Court feels is applicable to this case is as follows:

Where ballots cast by illegal voters can be identified, they should, of course, be rejected, the rule being that the first effort should be to purge the poll by proving by whom the illegal votes were cast and thus ascertain the real vote.

And then further it follows that where it is possible to separate the illegal votes and show for whom they were cast, they will be deducted from the total and the court will give effect to the will of the voters and declare the nominee to be the one who received the most legal votes.

And further, extrinsic evidence must be employed to determine who the illegal voters were and ascertain how they voted and circumstantial evidence is competent to prove that point.

The Court has listened to two days of testimony, read the transcript of the previous hearing conducted by Judges Nobile and Leon, the deposition of Gilbert Fortier, the handwriting expert, and has, at least, perused all of the other relevant documentary evidence that has been admitted here.

The tabulations from the various Clerks of Court indicate the following results: St. Bernard, for Moreau, 4,478, for Tonry, 11,560; Orleans Parish, 34,067 for Moreau, 31,965 for Tonry; Plaquemines Parish, 5,519 votes for Moreau, 598 votes for Tonry; St. Tammany Parish, 4,541 votes for Moreau and 4,666 for Tonry.

These totals are then: Tonry, 48,789; Moreau, 48,605.

Subtracting the two figures indicates a lead for Tonry of 184 votes.

So for purposes of this decision, the Court will hold that the difference between Tonry and Moreau was 184.

The thrust of Plaintiff's case surrounds fifteen precincts in St. Bernard: 1/1, 1/3, 1/4, 2/1, 2/2, 2/5, 2/6, 3/1, 3/2, 3/3, 3/4, 3/6, 4/1, 4/2, 4/3.

The tabulation of the returns from these precincts by employees of the Plaquemines Parish Commission Council indicated that 616 more votes appeared on the voting machines than had voter signatures in the registration books.

The poll lists and the numbers on the machines, however, showed only minimal differences.

Moreau contends that the Rowley Faction commissioners were in charge in the precincts that I have just enumerated and that since Sheriff Rowley supported Tonry, that the discrepancies that they found amounted to election fraud.

Tonry responded by saying that the tabulations by the Plaquemines employees should be given little, if any, weight, because the Perez faction supported Moreau.

The Court does feel that there was election fraud in Ward 3, Precinct 6. Most of the forgeries were found there. Some dead people even appeared to have voted. The Court's untrained eye clearly could see the obvious discrepancies.

About twenty witnesses testified that they did not vote and that the signatures appearing on their registration card were neither theirs nor, in some cases, their spouses.

Joseph Aiola votes in this box, Ward 3, Precinct 6. Physically he was a very ill man. He testified that one commissioner went in with him into the voting machine as he closed the curtain and pulled Tonry's keys.

The Court cannot attach any weight to this testimony because Mr. Aiola made an incredible statement insofar as the Court was concerned that he was going in there, that he was not going to vote for anyone, but he had just gone to the polls to sign their book.

But the Court does feel that the forgeries are a very serious matter. All of the commissioners of 3/6 invoked the Fifth Amendment. In a civil case the rule is, as I appreciate it, that while a claim of Fifth Amendment privilege may not be used against a man in a subsequent criminal prosecution, an inference that his testimony would have been unfavorable to him is available to the opponent in a civil case.

Of course, plaintiff called these witnesses as his own but the Court feels that it may use the unfavorable inference against these commissioners.

This will eliminate twenty votes from Tonry in this box plus the twenty-three excessive votes and reduce his total by forty-three votes.

The other serious charge was in Ward 4, Precinct 2. One commissioner from this box testified, Mr. McKenna. Three others were unable to be served and the Sheriff reported that they were out of the State.

These four are alleged to be part of the Rowley faction. The fifth commissioner was a Mr. Nunez. He was not called to testify. And Mr. McKenna testified that Nunez was a Moreau supporter. A Haral Nunez was under subpoena earlier, but never was called to the stand. I don't know if these are the same two men or not, but regardless Mr. Mc

Kenna's testimony that Nunez was for Moreau has gone unchallenged and I accept that as fact. Accordingly, it is inconceivable that he would have kept his peace if the other commissioners at that poll rang the bell 178 times or even one time, for that matter.

In addition to Mr. McKenna, the following commissioners of suspicious boxes testified either before me or earlier before the other judges: M.V. Brown, 2/5; Kenneth Cantu, 2/6; Joseph D. Vidal, 1/4; Lester Culotta, 2/2; Alex Ruiz, 3/4; Alcide Hernandez, 2/6, M. W. Eppinette, 2/2 and L.J. Sanchez, 2/5. Some of these gentlemen were called by plaintiff; others were called by defendant. None inculpated themselves in any respect and no improper conduct against these commissioners were proven.

If I accept Mr. Fortier's opinion that there were fifty-one forgeries and add twenty-three extra votes from 3/6, the excessive votes, Mr. Tonry would still maintain a lead.

It was obvious to the Court that the Plaquemines employees went over the books with a fine-tooth comb and only fifty-one forgeries were accounted for by Mr. Fortier.

Now, to the guts of the case: Can this Court infer that the seventy-five commissioners in the suspect boxes permitted voter fraud to take place on the sole inference that they were either members of the Rowley faction, employed by Rowley or other public bodies in St. Bernard or had served on prior occasions as Rowley commissioners?

It is curious to note that neither Tonry or Moreau submitted a commissioner's list or employed poll watchers, but to resolve the question I have posed, I must go back to the test as set forth in Dowling: Can these alleged illegal ballots be identified?

The answer is no because the only extrinsic circumstance

is that the commissioners are or were aligned in the Rowley camp. You must first start with the legal presumption that commissioners are presumed to do their duty.

Taking that presumption and adding to it the Dowling rationale that the use of circumstantial evidence must be so strong that it excludes every other reasonable hypothesis compels this Court to rule that plaintiff has failed in his burden of proof.

For these reasons plaintiff's suit is dismissed at his costs.

Before adjourning court, I should like to publicly thank the Clerk of Court and his employees, the Sheriff and his employees, Judge Nobile and Judge Gautier for being so cooperative and helpful to me and my staff during the last few days.

And gentlemen, I want to thank both sides for the very professional demeanor with which you conducted your presentation during a most difficult case.

Now, gentlemen, I propose to sign a judgment before I leave here this evening setting forth that the plaintiff's suit is dismissed, if * * * *

APPENDIX "D"

SECTION 364, TITLE 18 LOUISIANA REVISED
STATUTES

R.S. 18:363

ELECTIONS

History and Source of Law

Source:

Acts 1940, No. 46, § 85.

Library References

Elections 126(6), 319. C.J.S. Elections §§114, 118, 330.

Notes of Decisions

1. Construction and application

Special deputies in primary elections appointed by the committee keep peace and order at the polls and are subject to control of the commissioners. Op. Atty. Gen., March 18, 1968.

The purpose of this section is to afford protection to election officers in performance of their duties. Op. Atty. Gen. 1942 - 44, p. 349.

Police officers detailed to serve under this section are entirely under the control and orders of the commissioners of election and become part of the election machinery. Id.

Peace officers to serve at polling places were to be appointed by Board of Supervisors of Elections from a list furnished by the chief executive officer of the police force not less than 10 days before primary election. Op. Atty. Gen. 1938 - 40, p. 277.

Under Section 2 of Act No. 4 of 1934 Second Extra Session, the Board of Supervisors of Elections might appoint as many special officers as they deemed necessary to preserve order on election day, and that section was not repealed by Act No. 28 of 1935, Second Extra Session, authorizing use of city police officers for that purpose. Op. Atty. Gen. 1938 40, p. 276.

Where polling places are located in a city, peace officers to maintain order at polling places should be police officers appointed by the Board of Supervisors of Elections of the parish from a list of the police force of the city furnished by the executive officer of the police force, and for polling places located outside the city, peace officers known as special officers should be appointed by the Board of Supervisors of Elections. Op. Atty. Gen. 1938 - 40, p. 274.

§ 364. Contests; petition; deposit; recount; answer; trial; judgment; appeal; time of bringing contest.

A. In elections under this Part all contests shall be made before the courts of the state, as herein prescribed, which courts have the necessary power, authority, and jurisdiction to hear, try, and determine them.

B. Any candidate for a nomination for any office who claims that but for irregularities or fraud he would have been nominated or that he would have been entitled to enter a second primary and desires to contest the election, shall present a petition to the judge of the district court of the parish in which the capitol of the state is situated, if the office be that of governor, lieutenant governor, Attorney General, Secretary of State, State Treasurer, state auditor, superintendent of public education, or other state officer, or United States Senator. If the office be a municipal, parochial, or district office, the petition shall be presented to the district court of the parish in which the contestee resides. The petition shall set forth specifically in detail the grounds on which the con-

test is based and the irregularities or frauds of which complaint is made. In addition to the procedure set forth above, the contestant or the contestee may, on allegation on information and belief that a proper recount of any box or boxes in the municipality, district, parish, or state, as the case may be, would change the result of the election, require the recount of all or any specified ballot boxes. In order to obtain the recount the candidate shall accompany his petition or answer with a deposit in cash of twenty dollars for each box on which a recount is demanded, which sum shall be used to defray the expenses of the recount, including a reasonable fee to the counters of the boxes. It shall not be necessary in order to obtain the recount to allege or prove any specific fraud or irregularity. Immediately upon the filing of a petition or answer containing such a request for a recount, accompanied by the required deposit, the judge having jurisdiction shall name sufficient counters to conduct the recount, and upon the date set for the trial of the contest, as provided in this Part, shall proceed in open court to cause the boxes to be recounted and the result of the recount to be announced publicly in the court room. However, before any box is thus recounted satisfactory evidence shall be produced to the court that the box or the contents thereof have not been tampered with or disturbed subsequent to its closing by the commissioners. Immediately upon the filing of the petition, whether the petition contains an application for a recount as hereinabove provided or not, the judge or, in his absence, the clerk of the court shall issue an order directing the contestee to answer the petition within five days after service upon him of a certified copy and order. The contestee shall answer not later than ten o'clock A.M. on the fifth day after service, including Sunday and legal holidays; if the fifth day is a Sunday or other legal holiday, then on the next succeeding legal day. At that time, whether the contestee has answered or not, the court shall proceed without further delay and in a summary manner to try the issue presented. The trial shall be in open court or in chambers, without a jury.

C. Either party may take evidence relative to the facts specified or to be specified in the petition at any time before the trial, on giving the other party two days notice of the time and place the evidence is to be taken. The evidence may be taken before any officer authorized to administer oaths, who may issue process to compel the attendance of witnesses and the production of documentary evidence of any kind.

D. The court of original jurisdiction shall render judgment within twenty-four hours after the case is submitted.

E. The party cast may appeal as in other cases, on giving bond for a sum to be fixed by the court to cover cost of all courts, the emoluments of the office involved for the full term being the test of the appellate jurisdiction. However, the appeal shall be filed in the appellate court within not more than five days from the rendition of the judgment, and shall be tried on the original record and by preference over all other cases whatsoever. The appellate court shall decide the issue within twenty-four hours after submission.

F. Upon the perfection of an appeal the clerk of court shall immediately notify the appellate court in writing. The appellate court shall immediately set the appeal down for hearing without awaiting the actual lodgment of the appeal and shall hear the appeal at the earliest practicable moment. If the supreme court is in vacation, the chief justice shall convene the court at once in special session.

G. If a trial of the cases appealed to the court of appeal is desired when the courts are in vacation, the judges composing the court shall meet in session without delay. No application for rehearing shall be entertained by any court, but the courts may upon their own motion correct manifest errors to which their attention may be called.

H. No contest shall be entertained unless brought within two days after the official promulgation of the result of the

election, made by the secretary of state, or by respective committees as provided in this Part.

History and Source of Law

Source:

Acts 1940, No. 46, § 86.

Cross References

Appellate jurisdiction of Supreme Court, see LSA-Const. Art 7, § 10.

Contestee as nominee when contest not decided in time to print name on ballot, see R.S. 18:362.

Election contests, see LSA-Const. Art. 8, § 12.

Law Review Commentaries

Contest of right to be declared nominee for public office. Henry G. McMahon, 16 La. L. Rev. 308 (Feb. 1956).

Library References

Elections 154.

C.J.S. Elections § 120.

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APPENDIX "D"

IN THE COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

NO. 8222

JAMES A. MOREAU
V.
RICHARD A. TONRY

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES

Notice is hereby given that James A. Moreau, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of dismissal of the Supreme Court of Louisiana, entered in this action on October 22, 1976.

This appeal is taken pursuant to 28 U.S.C. 1257 (2).

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A-38

JAMES A. MOREAU 25TH JUDICIAL DISTRICT COURT

V. PARISH OF ST. BERNARD

RICHARD A. TONRY STATE OF LOUISIANA

NUMBER 28-837

FILED DEPUTY CLERK

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES

Notice is hereby given that James A. Moreau, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of dismissal of the Supreme Court of Louisiana, entered in this action on October 22, 1976.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

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A-40

IN THE SUPREME COURT
OF THE STATE OF LOUISIANA

JAMES A. MOREAU

V.

No. 58-791

RICHARD A. TONRY

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES

Notice is hereby given that James A. Moreau, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of dismissal of the Supreme Court of Louisiana, entered in this action on October 22, 1976.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

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Supreme Court, U. S.

FILED

FEB 18 1977

MICHAEL RODAK, JR., CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1976

NO. 76-1034

JAMES A. MOREAU

Versus

**RICHARD A. TONRY, THE FIRST CONGRESSIONAL DISTRICT
OF DEMOCRATIC EXECUTIVE COMMITTEE AND HONORABLE
PAUL J. HARDY SECRETARY OF STATE OF LOUISIANA**

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

MOTION TO DISMISS

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO.

JAMES A. MOREAU

Versus

RICHARD A. TONRY, Et al.

ON APPEAL FROM THE SUPREME COURT OF
LOUISIANA.

MOTION TO DISMISS

Pursuant to Rule 16(1)(b) of the rules of this Court, the
appellees move herein that the appeal be dismissed.

STATEMENT

This is an appeal from the Supreme Court of Louisiana which upheld the dismissal of the election contest suit brought by Mr. Moreau concerning the primary election for United States Representative from the First Congressional District in Louisiana.

On October 2, 1976, the second primary was held for the Democratic nomination for the seat in the United States House of Representatives for the First Congressional District of Louisiana. Following that election, the Secretary of State of Louisiana certified Richard A. Tonry as the Democratic nominee because the commissioners' tally sheets forwarded to the Secretary of State reflected that Richard A.

Tonry had received three hundred and sixty-two (362) more votes than James A. Moreau. James A. Moreau brought an election suit pursuant to La. R.S. 18:364 asserting that but for fraud and irregularities he would have been the nominee and was in fact the nominee by reason of the legal vote cast. Moreau claimed that in fifteen precincts in the Parish (County) of St. Bernard, a total of 649 fraudulent votes were cast. In addition, Moreau asserted that in thirteen of the same fifteen precincts in St. Bernard there were a total of 795 illegal votes cast. Moreau then asserted that the subject precincts were controlled by commissioners appointed by Richard A. Tonry and that, therefore, the Court should find that the total of alleged illegal votes of 795 should be deducted from Richard A. Tonry's lead of 184 and that James A. Moreau should be declared the Democratic nominee. In the alternative, James A. Moreau prayed that if the specific fraudulent votes could not be identified the election should be voided because of widespread fraud and irregularity.

The matter was tried before Louisiana District Judge Melvin Shortess and a decision rendered on October 15, 1976. The District Court found no basis for voiding the election. The District Court found that there were 43 illegal votes cast in favor of Defendant Tonry and reduced his majority of 184 by that amount. The Court then found that there was no further substantial credible evidence to indicate either additional illegal votes or their attribution to Defendant Tonry and therefore held that Tonry still had a majority of the legal votes cast and dismissed plaintiff's case.

The Louisiana Court of Appeal, sitting en banc, unanimously annulled the decision of the District Court and set aside the election. The appellate court found a total of 43 forged votes but found they were not attributable to either

candidate. They further found that 315 illegal (though not fraudulent) votes were cast. The Court, however, could not attribute these votes to Tonry, and therefore, did not declare Moreau the winner.

The Louisiana Supreme Court reversed the Court of Appeal and reinstated the judgment of the District Court, dismissing plaintiff's suit. The Court found that Mr. Moreau could not prove that "but for" the irregularities plaintiff would have won. Further, under the alternative standard, the Court found that here the proven frauds were not of such a serious nature that the voters had been deprived of a free expression of their will. The Court finally stated that the irregularities found by the Louisiana Court of Appeal were not so pervasive that the election had to be nullified.

The plaintiff then changed his posture from candidate to elector and brought suit in Federal Court pursuant to 42 U.S.C. § 1983 for deprivation of rights under the Fourteenth Amendment to the United States Constitution and under the Civil Rights Act of 1965, making the same allegations as in the state court suit. This suit was dismissed for lack of jurisdiction and/or failure to state a claim pursuant to F.R.C.P. Rule 12(b). A second federal suit was filed, identical to the first except that it was styled as a class action on behalf of all those who cast their votes for Moreau in the primary.

The District Judge refused to grant defendants' Motion to Dismiss in the second federal court case but did certify questions to the Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1292(b).

Before the Fifth Circuit had an opportunity to hear and

decide the orders on appeal, plaintiff applied to this Court through Justice Powell, Circuit Justice, to vacate the stay of the Temporary Restraining Order issued by the District Judge, which prohibited the Secretary of State from certifying Tonry as United States Representative from the First Congressional District of Louisiana to the House of Representatives. This application was summarily denied, No. A-384, on November 12, 1976. A second application for a stay requesting similar relief and asking that this Court remain and order an immediate hearing in the District Court, was similarly denied on December 6, 1976.

On January 26, 1977, the United States Court of Appeals for the Fifth Circuit heard argument on the certified questions from the District Court. The court has not yet, however, rendered an opinion on the matter.

ARGUMENT

THIS CASE IS NOT PROPERLY PRESENTED FOR APPEAL NOR CERTIORARI PURSUANT TO 28 U.S.C. § 1257 BECAUSE THE FEDERAL CONSTITUTIONAL ISSUES WERE NEITHER RAISED IN NOR DECIDED BY THE STATE COURTS

Appellants allege that this Court has jurisdiction of this matter on appeal from the Supreme Court of Louisiana, pursuant to 28 U.S.C. § 1257(2) which provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn in question the

validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

This provision has been construed to mean that an appeal as of right lies from the highest court of a state to this court if the highest court of the state passed on the validity of a state statute with respect to the United States Constitution and found such statute constitutional. *Jenkins v. Georgia*, 418 U.S. 153 (1974). *Hicks v. Miranda*, 422 U.S. 322 (1975).

While 28 U.S.C. § 1257(3) permits application for a writ of certiorari from the highest court of a state to this court, we note that this provision requires that the Federal constitutional issues be raised in the state courts. As this Court stated in *Tacon v. Arizona*, 410 U.S. 351, 352 (1972): "We cannot decide issues raised for the first time here. . ."

Plaintiffs admit that they failed to raise the federal constitutional issues in the state courts. (Jurisdictional Statement at p. 7). They claim, however, that they could not have anticipated that the Supreme Court of Louisiana would have interpreted R.S. 18:364 as it did. Further, they note that they could not have applied for rehearing as such is precluded by the Election Contest Law of Louisiana (Jurisdictional Statement at p. 6).

Defendants contend, and can show, that the interpretation herein of R.S. 18:364 by the Louisiana Supreme Court was consistent with the interpretation of said statute in prior jurisprudence. In addition, the statute provides for a reconsideration in order that the Court "may correct manifest errors to which their attorneys may be called."

INTERPRETATION OF R. S. 18:364 BY THE LOUISIANA SUPREME COURT WAS CONSISTENT WITH THE INTERPRETATION OF SAID STATUTE IN PRIOR JURISPRUDENCE

Petitioner contends that the Louisiana Supreme Court decision, reversing the Court of Appeals and reinstating the judgment of the District Court, constituted a new and wholly unforeseeable interpretation of R.S. 18:364, and that therefore the challenge to the statute's constitutionality may be raised for the first time in petition for appeal to the United States Supreme Court. Petitioner further contends that because no application for rehearing is permitted under R.S. 18:364, he has no alternative but to petition this Court. For reason specified below, there is no merit to either of these arguments.

In maintaining that the Louisiana Supreme Court decision contravened the well established jurisprudence in the state, and therefore could not possibly have been anticipated, petitioner relies totally on two cases: *Dowling v. Orleans Parish Democratic Committee*, 235 La. 62, 102 So. 2d 755 (1958), and *Lacaze v. Johnson*, 310 So. 2d 86 (La. 1974). In so doing, petitioner not only manages to overlook the case most pertinent to the issue in question, *Lewis v. Democratic Executive Committee*, 232 La. 732, 95 So. 2d 292 (1957).

In *Lewis*, the plaintiff challenged the official results of a primary election for Mayor of Eunice, Louisiana, showing that he had received a total of 2043 votes to his opponent's 2075 votes. The plaintiff contended that various irregularities and illegal acts occurring during the election in one of the voting polls had deprived him of the nomination.

The Louisiana Supreme Court pointed to the Primary Election Contest Law (R.S. 18:364), which gives the Courts the power to declare a plaintiff the victor where he is able to prove that "but for" fraud and irregularities he would have received a majority of the legal votes case. However, the Court states:

". . . it has been recognized as an alternative proposition that, in the event the court finds that the frauds and irregularities alleged and proven are of such a grave nature so as to deprive the voters of the free expression of this will, it will annul the primary and order the holding of another election." (citation omitted)

The Court, in a detailed analysis of the alleged infractions, concluded that "substantial" irregularities had indeed occurred. Nevertheless, the Court maintained that the various infractions fell "far short" of justifying annulment of the election. The Court stated:

"For this Court to render such a drastic order, there must be clear showing that a course of fraudulent conduct was employed which effectually prevented the electors from expressing their will."

In other words, sufficient evidence must exist showing that a substantial number of votes were cast illegally, and that more than an insignificant few of these were cast in a fraudulent scheme to fix the election results. As the Louisiana Supreme Court stated in the instant case, while an election might be nullified "for widespread fraud which cannot

be proved to supply the winning margin," pervasive fraud on behalf of a particular candidate must nevertheless be shown to have occurred. This is the clear and unmistakable message of *Lewis*.

Niehter *Dowling* nor *Lacaze* break with the *Lewis* analysis. In *Dowling*, the plaintiff had lost his bid to be elected District Attorney of Orleans Parish by a bare nine vote margin. The majority found that seventeen votes were not only illegally but also fraudulently cast for the defendant. Fraud was inferred in this case because it was determined that the seventeen votes could have been cast only with the complicity of the commissioners assigned as supervisors, all of whom were supporters of the defendant, and wore buttons so signifying at the polls. The Court declared the plaintiff, *Dowling*, the winner. In the Court's judgment, the circumstantial evidence was strong enough to justify the conclusion that "but for" the perpetrated fraud *Dowling* would have received the majority of votes.

Thus, *Dowling* falls under the first of the two alternative propositions recognized in *Lewis*. There was no suggestion by plaintiff in *Dowling* that vote fraud permeated the whole election. Rather, unlike the present controversy, the case dealt with an isolated instance of fraud which, at least by inference, established the plaintiff as the clear victor.

Plaintiff states:

"The significance of the case, so far as the issue here is concerned, lies in the unanimous agreement of all members of the court, that the very least that should have been done was to nullify the election."

This statement is plainly inaccurate. Nowhere in the Court's opinion is there language indicating or even implying that nullifying the election was an appropriate remedy in the absence of evidence that fraud directed toward promoting the defendant's chances of winning permeated the primary.

Lacaze is no more on point than *Dowling*. *Lacaze* did not involve fraud at all, but rather was based on a claim that the malfunctioning of one voting machine upset the election results.

Unfortunately, because the majority issued no opinion in the case, but simply denied writs, there is no way of definitely determining whether the absence of alleged fraud was the critical factor in the court's decision to nullify the election. However, there is good reason to believe that this may very well have been the rationale. To nullify an election because of fraud creates risks that simply don't exist where a contest is declared invalid subsequent to a serious but innocent mechanical malfunction. As the Supreme Court stated in *Landry v. Ozenne*, 195 So. 23, 194 La. 853 (1940), a case involving multiple charges of fraud:

"There is nothing in plaintiff's allegations that any defeated candidate could not set up after his defeat and thereby throw an election into the courts. If this were permitted it is easy to see that in every case in which a candidate was defeated by a small margin of the votes, two elections would inevitably be held -- one at the polls and the other in the courts."

Clearly, what the Courts are attempting to prevent is a

situation where one candidate having benefitted from the perpetration of fraud by his supporters, should succeed in having the election nullified on the ground that fraud was committed. As the Supreme Court stated in the instant case:

"The solution adopted by the Court of Appeal is innovative, and not necessarily productive of fair elections. The candidates are removed from the reach of the lawful election machinery, *even though neither has been found responsible for fraud and irregularity*, and neither can be held the winner "But for" the irregular votes. [Emphasis added.]

Thus, in summation, not only has Plaintiff Moreau failed to establish his claim that the Louisiana Supreme Court's refusal to invalidate the election results of the October 2, 1976 primary between James A. Moreau and Richard A. Tonry was thoroughly inconsistent with previous rulings by the Court under La. R.S. 18:364, but he has failed even to provide this Honorable Court with one case supporting his contention of inconsistency. Therefore, the argument that plaintiff's constitutional rights have been impinged by the construction given to R.S. 18:364 for the first time by the Supreme Court of Louisiana is totally without merit.

**PLAINTIFF WAS AFFORDED THE OPPORTUNITY
UNDER THE ELECTION CONTEST LAW TO PETITION
FOR A REHEARING**

Plaintiff's claim that petitions for rehearing are not permitted under the Election Contest Law of Louisiana is only partially accurate. R.S. 18:364(G) provides in part:

"No application for rehearing shall be entertained by any court, but the courts may upon their own motion correct manifest errors to which their attention may be called."

The Courts of Louisiana have defined "manifest error" as error which is "evident, apparent, clear, visible, unmistakable, and indisputable." *State Department of Highways v. Moity*, 276 So. 2d 770, 773 (La. App. 1973); *Norman v. State*, 69 So. 2d 120, 131 (La. App. 1953).

Plaintiff's appeal before the Court is founded on the argument that the decision by the Louisiana Supreme Court was so blatantly inconsistent with previous Court rulings as to be manifestly erroneous. On this basis, however, plaintiff could have asked the Louisiana Supreme Court for a rehearing of the case by calling to that Court's attention the "manifest error" based on the constitutional grounds now asserted here for the first time. It is well settled that this Court will refuse to decide issues raised for the first time here on appeal. *Tacon v. Arizona*, 410 U.S. 351 (1972); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430 (1940). Thus, defendants submit that plaintiff has no right of appeal under 28 U.S.C. § 1257(2).

CONCLUSION

It is respectfully prayed that plaintiff's appeal under 28 U.S.C. § 1257(2) should be denied for the several reasons discussed above.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties by mailing same to each properly addressed and postage prepaid on this 18th day of February, 1977.

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